ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment to the Commission's Rules	)	
Regarding a Plan for Sharing	)	WT Docket No. 95-157
the Costs of Microwave Relocation	)	RM-8643

CONSOLIDATED OPPOSITION TO PETITIONS FOR RECONSIDERATION

The Association of American Railroads

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SUMMARY

The Association of American Railroads ("AAR") hereby opposes several of the petitions for reconsideration filed in this proceeding. AAR's member railroads employ a large number of private fixed microwave systems that operate in the 2 GHz band to meet safety and reliability requirements in their day to day operations. Therefore, AAR seeks to ensure that these critical uses are not disrupted during the microwave relocation process and that incumbents be made whole as a result of relocations.

Because they do not promote these important goals and because they make proposals which would be harmful to the interests of incumbents, AAR opposes the following petitions for reconsideration:

AT&T Wireless Services, Inc., GTE Mobilenet, PCS PrimeCo, L.P., Pocket Communications, Inc., Western PCS Corporation, and the Cellular Telecommunications Industry Association petitioned the Commission to reconsider its decision not to address the issues they raised in an April 15 letter -- requiring incumbents to vacate the 2 GHz band by the end of the mandatory period or automatically converting incumbents' licenses to secondary status at the end of the mandatory period. Notwithstanding the fact that the Commission properly refused to address these arguments earlier in this proceeding and should again refuse to address them as untimely raised, if the Commission does decide to address the substance of these proposals, they should be rejected because they are very different from anything proposed earlier in this proceeding and are harmful and unfair to incumbents. Requiring incumbents who use private microwave systems for operational safety and public safety to abruptly vacate the band after as little as three years would have a deleterious effect on these safety uses. Exposing these incumbents to the potential interference associated with converting their licenses to secondary status after only three years would also endanger these critical safety uses and is clearly unacceptable.

The MSS coalition urged the Commission not to apply automatically the relocation and cost sharing rules it adopts in this proceeding to other emerging technologies -- specifically 2 GHz MSS. Underpinning its argument is its assertion that sharing between fixed microwave incumbents and MSS providers has been demonstrated to be feasible. This is simply not true. As the record in ET Docket No. 95-18 demonstrates, the feasibility of sharing in this band is hotly contested and is far from proven. Until the MSS Coalition meets the burden of proving with absolute certainty that sharing is feasible, which it has not done so far, contrary to its assertions, the relocation and cost sharing rules adopted in this proceeding should be applied to other emerging technologies to ensure that incumbents are made whole from the beneficiaries of newly cleared spectrum.

Finally, Omnipoint Communications, Inc. ("Omnipoint") petitioned the Commission to clarify that it is a bad faith request for an incumbent to demand a cash payment above

and beyond the costs of relocation. AAR opposes this proposal because each relocation negotiation is different and its terms should be determined on a case-by-case basis. What one party views as a demand for a cash windfall may be viewed by the other party as a legitimate and reasonable relocation expense. The Commission's rules must be flexible enough to accommodate these differences.

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Pursuant to Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429, the Association of American Railroads ("AAR"), by its attorneys, hereby opposes the following petitions for reconsideration in the above-captioned proceeding[1]: the "Petition for Reconsideration or, in the Alternative, for Rulemaking" (the "Joint Petition") filed by AT&T Wireless Services, Inc., GTE Mobilenet, PCS PrimeCo, L.P., Pocket Communications, Inc., Western PCS Corporation, and the Cellular Telecommunications Industry Association (collectively, the "Joint Petitioners"); the "Petition of the MSS Coalition for Clarification or, in the Alternative, Partial Reconsideration" (the "MSS Petition") filed by ICO Global Communications, Celsat America, Inc., Comsat Corporation, the Personal Communications Satellite Corporation and Hughes Space and Communications International (collectively, the "MSS Coalition"); and the "Petition for Reconsideration and Clarification" filed by Omnipoint Communications, Inc. ("Omnipoint"). In support of this opposition, the following is shown:

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[1] First Report and Order and Further Notice of Proposed Rule Making, FCC 96-196 (April 30, 1996), 61 Fed. Reg. 29,679 (1996) ("First R & O" or "Further Notice").

AAR is a voluntary non-profit organization composed of member railroad companies operating in the United States, Canada and Mexico. AAR represents its member railroads in connection with federal regulatory matters of common concern to the industry, including matters pertaining to the regulation of communications. In addition, AAR functions as the frequency coordinator with respect to the railroad industry's operation of land mobile and other spectrum-based facilities.

The U.S. railroad industry deploys and depends on a sophisticated and comprehensive interrelated radio communications network consisting of both mobile and fixed service ("FS") point-to-point communications systems and facilities. The railroads use private FS microwave systems that operate on frequencies in the 2 GHz band to meet safety and reliability requirements in their day-to-day operations. Private microwave facilities are used to monitor and control more than 1.2 million train cars on more than 215,000 miles of track. For example, microwave systems carry information regarding train signals and the remote switching of tracks and routing of trains that are necessary for the safe operation of trains on rights-of-way and through depots and freight yards. These systems also relay critical telemetry data from trackside defect detectors located throughout the rail network. Information about damaged rails, overheated wheel bearings, dragging equipment, rock slides and the like is automatically transmitted from these detectors via mobile radio links to engineers in trains, who can then take the necessary actions to prevent derailments, and via fixed microwave links to dispatchers in distant locations, who are required to know the status of the equipment along the routes for

which they are responsible. Microwave systems also are vital to coordination of operations between and among the different railroads.

As AAR has stated on prior occasions, its goal in this proceeding is to ensure that the implementation of the 2 GHz relocation transition framework will not endanger the safety and reliability of the nation's railroads. To ensure that this goal is realized, AAR has participated actively in every stage of the Commission's proceedings relating to reallocation of the 2 GHz band.[2] AAR opposes the petitions for reconsideration identified above because the proposals in those petitions would be contrary to the public interest and the interests of microwave incumbents, and would endanger the safety and reliability of the nation's railroads.

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[2] *See, e.g.,* AAR Petition for Clarification, filed March 23, 1992; Petition to Suspend Proceeding, filed by AAR, the Large Public Power Council and the American Petroleum Institute on April 10, 1992; AAR Comments, ET Docket No. 92-9, filed January 13, 1993; AAR Reply Comments, ET Docket No. 92-9, filed February 12, 1993; AAR Reply Comments, ET Docket No. 92-9, filed November 18, 1993; AAR Comments, ET Docket No. 94-32, filed December 19, 1994; AAR Reply Comments, ET Docket No. 94-32, filed January 3, 1995; AAR Comments in response to Pacific Bell Mobile Services ("Pacific Bell") Petition for Rule Making, filed June 15, 1995; AAR Reply Comments in response to Pacific Bell Petition for Rule Making, filed June 30, 1995; AAR Comments to Notice of Proposed Rulemaking ("NPRM") in WT Docket No. 95-157, filed November 30, 1996; AAR Reply Comments to NPRM in WT Docket No. 95-157, filed January 16, 1996; AAR Comments to First Report and Order and Further NPRM in WT Docket No. 95-157, filed May 28, 1996; AAR Reply Comments to First Report and Order and Further NPRM in WT Docket No. 95-157, filed June 7, 1996; AAR Petition for Partial Clarification and Reconsideration of the First Report and Order in WT Docket No. 95-157, filed July 12, 1996.

A. The Joint Petition

The Joint Petitioners have asked the Commission to reconsider the decision not to address the issues raised in their April 15, 1996 ex parte letter to the Commission.[3] In both their April 15 Letter and their Joint Petition, the Joint Petitioners requested the Commission to alter its rules to either (1) require microwave incumbents to vacate their 2 GHz frequencies by the end of the mandatory negotiation period, or (2) automatically convert microwave incumbents' licenses to secondary status immediately upon expiration of the mandatory period. AAR opposes both of these proposals because they would unfairly favor PCS licensees in the relocation process at the expense of incumbents and, more importantly, because they would endanger the safety and reliability of the nation's railroads. Furthermore, AAR supports the Commission's decision not to address the issues raised in the April 15 Letter and opposes the Joint Petitioner's attempt to "have another bite at the apple" by filing the Joint Petition.

1. The Joint Petitioners' Argument That the Commission is Required to Reconsider the Issues it Raised in the April 15 Letter is Misleading and Unpersuasive

In their attempt to persuade the Commission to reconsider its decision not to address the issues raised in their April 15 Letter, the Joint Petitioners have read the Commission's rules and orders in an incorrect and self-serving manner. First, they cited

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[3] See Letter from AT&T Wireless Services, Inc., BellSouth Personal Mobile Communications, GTE Mobilenet, PCS PrimeCo, L.P., Western Wireless Corp., DCR Communications and Pacific Bell Mobile Services to Michelle Farquhar, Chief, Wireless Telecommunications Bureau, April 15, 1996 ("April 15 Letter").

Section 1.429(a) of the Commission's rules[4] in support of the proposition that "[p]arties may petition for reconsideration of any issues raised in notices of proposed rulemaking or by commenting parties."[5] However, nothing resembling the underscored language appears in Section 1.429(a). The rule reads, in pertinent part, that "[a]ny interested person may petition for reconsideration of a final action in a proceeding conducted under this subpart . . ."[6] The rule does not provide that parties may petition for reconsideration of issues raised by commenting parties. Even if the rule did provide for this, which it does not, the Joint Petitioners would not prevail because the issues raised in the April 15 Letter were not raised by "commenting parties" but rather were raised in an untimely manner by the Joint Petitioners. Not being bound by any requirement to address them (the Joint Petitioners' claim to the contrary notwithstanding), the Commission's decision not to address the issues was a proper exercise of its discretion.[7]

The Joint Commenters then argued in their Petition that "[e]ven if the Commission determines that issues related to the status of incumbents following the mandatory period were not adequately raised, grant of the Petitioners' request would be in the public

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[4] 47 C.F.R. § 1.429(a) (1995).

[5] Joint Petition at 3 (emphasis added).

[6] 47 C.F.R. § 1.429(a) (1995).

[7] First R & O, ¶ 52. Although each of the Joint Petitioners did file comments on the initial Notice of Proposed Rulemaking in this proceeding, they did not raise these issues in their comments and therefore they should not be considered "commenters" for the purpose of reconsideration of issues raised in the April 15 Letter.

interest."[8] In support of this proposition, the Joint Petitioners cited another section of the Commission's rules and stated that "the Commission may address requests to reconsider issues not previously raised when it would be in the public interest."[9] AAR agrees that the Commission may, in its discretion, address requests to consider issues not previously raised when it would be in the public interest to do so but submits that, for the reasons set forth below, reconsideration of these issues would not be in the public interest.

2. The Joint Petitioner's Proposals Regarding Incumbents' Status Following the Mandatory Negotiation Period are Against the Public Interest

Assuming, *arguendo*, that the issues raised by the Joint Petitioners should even be considered by the Commission at this late stage of this proceeding, the Commission should reject them because they are contrary to the public interest. In both their Joint Petition and their April 15 Letter, the Joint Petitioners requested the Commission to: (1) either require microwave incumbents to vacate their 2 GHz frequencies by the end of the mandatory negotiation period; or (2) automatically convert their licenses to secondary status immediately upon expiration of the mandatory negotiation period. These proposals are extremely harsh to incumbents and would endanger the public by disrupting the vital public safety uses of incumbents' microwave communications systems. Contrary to the assertions made by the Joint Petitioners, these proposals are also radically different from any previous proposals in this proceeding.

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[8] Joint Petition at 4.

[9] Joint Petition at 3 (emphasis added). The Joint Petitioners cited 17 C.F.R. § 1.429(b). AAR assumes that this was a typographical error and that they meant to cite to 47 C.F.R § 1.429(b).

The Joint Petitioners argued that their proposals have been adequately raised earlier in this proceeding. In support of this suspect argument, they note that the existing rules "provide for conversion of fixed microwave licensees to secondary status after involuntary relocation takes place" and that "[the Commission] asked for comment on its proposal to make secondary any other incumbents still operating in the 1850-1900 MHz band on April 4, 2005."[10] These points are inapposite, however, to the proposals made by the Joint Petitioners -- their proposals would require incumbents to vacate the band or convert incumbent licenses to secondary status before an involuntary relocation takes place.

Next, the joint Petitioners argued that the "general nature of the Notice[11] and the scope of comment sought provided parties with ample notice that the involuntary relocation procedures might be altered as suggested by the April 15 Letter."[12] This assertion is easily refuted by reviewing the Notice. Nowhere in the Notice did the Commission suggest that incumbents' licenses should be converted to secondary status at the end of the mandatory negotiation period, as little as three years after the PCS licenses were granted. In fact, the Commission suggested in the Notice that licenses of incumbents operating in the 2 GHz band after April 4, 2005 automatically revert to secondary status. In the First Report and Order the Commission specifically declined to

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[10] Joint Petition at 4 (emphasis added).

[11] Notice of Proposed Rulemaking, WT Docket No. 95-157, 11 FCC Rcd. 1923 (1995)("Notice").

[12] Id. AAR notes that in the Notice, the Commission sought comment on its proposal to convert microwave licensees to secondary status on April 4, 2005.

adopt this proposal. Rather, the Commission adopted a ten-year sunset period on PCS licensees' obligation to reimburse incumbents for the costs of relocation[13] and ordered that "2 GHz microwave incumbents will retain primary status unless and until an emerging technology licensee requires use of the spectrum . . ."[14] Thus, under the new rule, incumbents will retain their primary status indefinitely. This is significantly different from the three year period during which incumbents may maintain their primary status proposed by the Joint Petitioners. Such a major difference cannot be said to be in the "general nature" or "scope" of comment sought by the Commission. The Commission has never proposed anything as radical as forcing incumbents to vacate their frequencies in as little as three years regardless of the status of ongoing relocation negotiations.

Finally, the Joint Petitioners argued that the public interest will be served if the Commission reconsiders and ultimately adopts their proposals. AAR disagrees and submits that the public interest would be harmed severely by forcing incumbents to disrupt the vital safety uses of their microwave systems. As noted, AAR member railroads use private fixed microwave systems that operate on frequencies in the 2 GHz band to meet safety and reliability requirements in their day-to-day operations. Adoption of either of the Joint Petitioners' proposals would disrupt these critical safety uses by forcing incumbents to either vacate their 2 GHz frequencies or accept secondary licensing status

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[13] AAR does not endorse the Commission's ten-year sunset proposal. As noted in its "Petition for Partial Clarification and Reconsideration" ("AAR Petition") in this proceeding, AAR opposes the proposal and has asked the Commission to reject it. AAR Petition at 11.

[14] First R & O at ¶ 65.

(and consequent harmful interference) after as little as three years.[15] Any disruption to these critical uses could result in a disaster such as a train collision or derailment.

B. The MSS Coalition Petition

The MSS Coalition petitioned the Commission to clarify that the microwave relocation rules not be applied automatically to other emerging technology bands except where it is shown that sharing between the incumbent licensees and the emerging technology providers cannot work. In the alternative, if the Commission clarifies that the relocation rules adopted in this proceeding do apply to the 2 GHz MSS band, the MSS Coalition asked the Commission to reconsider their applicability to MSS technology.

The MSS Coalition falsely implies that sharing in the 2 GHz MSS band has been demonstrated to be feasible. In support of its Petition, the MSS Coalition states that it has been demonstrated in ET Docket 95-18[16] that sharing between MSS operators and microwave incumbents in the 2 GHz band is feasible. In the summary of its petition, the MSS Coalition asserts that "[r]econsideration is warranted because, as the MSS Coalition demonstrated in its May 17, 1996 comments in Docket 95-18, relocation rules are unnecessary to implement MSS and accommodate existing FS licensees: sharing

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[15] While incumbents would still be able to operate in their present frequencies if their licenses were converted to secondary status, they could not cause any interference to operations authorized on a primary basis and would be unprotected from interference from primary operations. See First R & O, ¶ 89. Clearly, this is an unacceptable situation for incumbents such as the railroads who use their microwave facilities for critical operational and safety purposes. No level of interference is acceptable for these uses.

[16] Amendment of Section 2.106 of the Commission's Rules to allocate Spectrum at 2 GHz for Use by the Mobile Satellite Service, Notice of Proposed Rulemaking, 10 FCC Rcd. 5230 (1995) ("2 GHz MSS Notice")

between FS and MSS licensees for an extended period is feasible."[17] The MSS Coalition goes on to assert that "immediate relocation of FS licensees is not required in . . . [the 2 GHz MSS] bands as is the case in the PCS spectrum. Sharing for an extended period between MSS and microwave incumbents is feasible."[18] The MSS Coalition then states "[a]s explained in the [Coalition's Joint Comments in ET Docket No. 95-18], relocation and reimbursement rules, in fact, are unnecessary for the 2 GHz MSS systems which will occupy the 2165-2200 MHz band."[19] These assertions are simply not true. As AAR pointed out in its response to Comsat's sharing proposal in ET Docket No. 95-18, the MSS Coalition has not proven that sharing is "in fact" feasible or that the relocation and reimbursement rules are "in fact" unnecessary for 2 GHz MSS systems.[20] Rather, members of the coalition have simply made the unsubstantiated assertion that sharing is "in fact" feasible.

The MSS Coalition completely mischaracterizes the status of ET Docket No. 95-18 regarding sharing. No conclusions have been made in ET Docket No. 95-18 concerning the feasibility of sharing and in fact, sharing is the single most important and contested issue in that proceeding. This is demonstrated by the large number of responses in opposition to Comsat's unsubstantiated claims regarding the feasibility of sharing between

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[17] Joint Comments of the MSS Coalition, ET Docket No. 95-18, filed May 17, 1996 ("May 17 Comments")(emphasis added).

[18] Id. at 2 (emphasis added).

[19] Id. at 7.

[20] Response of the Association of American Railroads to Supplemental Comments of Comsat Corporation, ET Docket No. 95-18, filed May 17, 1996.

MSS and FS operators.[21] Until it can be proven with absolute certainty that sharing between MSS operators and microwave incumbents can occur safely, the burden must be on the emerging technology provider to provide for and pay for the relocation of all affected incumbents. The Commission was correct, therefore, in deciding that the microwave relocation rules will "apply to all emerging technology services, including those services in the 2110-2150 and 2160-2200 GHz band . . . because the microwave relocation rules already apply to all emerging technology providers."[22]

C. The Omnipoint Petition

AAR opposes Omnipoint's proposal that the Commission "clarify[] that it is a bad faith request for the microwave incumbent to demand a cash windfall over and above all costs of relocation to comparable facilities."[23] While its member railroads have not and will not demand excessive "premiums" from PCS licensees as a precondition to moving from their spectrum, AAR believes that the terms of each relocation negotiation should be determined on a case by case basis. Thus, different types of compensation may be appropriate for some relocations while they would clearly be inappropriate in other

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[21] See, e.g., Comments to the Supplemental Comments of Comsat Corporation in ET Docket No. 95-18, of Alcatel Network Systems, Inc. ("Alcatel") at 2; Ameritech at 3; Association of Public-Safety Communications Officials International, Inc. ("APCO") at 5-6; American Petroleum Institute ("API") at 3-4; Central Iowa Power Cooperative ("CIPCO") at 4; BellSouth Corporation ("BellSouth") at 4-6; The State of California at 7; Fixed Point-to-Point Communications Section, Network Equipment Division of the Telecommunications Association ("TIA") at 6-9 and; UTC, The Telecommunications Association ("UTC") at 4-8.

[22] First R & O at ¶ 92.

[23] Omnipoint Petition for Reconsideration and Clarification, WT Docket No. 95-157, filed July 12, 1996, at 5.

situations. Both parties should have the flexibility to tailor the terms of each relocation agreement to the particular circumstances surrounding it.

Currently, the rules for the mandatory period permit any party alleging a violation of the good faith requirement to file a complaint with the Commission in support of its claim.[24] Thus if a PCS licensee feels that an incumbent has made an excessive demand during the mandatory period, it may seek relief from the Commission. During the mandatory negotiation period there are bound to be disputes between the parties as to what constitutes reimbursable relocation expenses. What one party views as reasonable and legitimate reimbursement for relocation costs may be viewed as an unreasonable demand by the other party. A blanket prohibition on what Omnipoint calls "cash windfalls" would leave no room for legitimate differences between the parties. For example, an incumbent who sought a cash payment for advance reimbursement of perfectly legitimate and reasonable contingency costs would be deemed automatically to be dealing in bad faith under the Omnipoint proposal. Rather than impose a blanket prohibition of requests for compensation by incumbents, the Commission should continue to rely on the dispute resolution procedures built in to its existing rules.

D. Conclusion

Throughout its involvement in this proceeding, AAR has sought to ensure that the vital public safety uses of its member railroads will not be endangered by the implementation of 2 GHz microwave relocation. In addition, AAR has advocated that incumbents must be made fully whole for the costs of relocation pursuant to the

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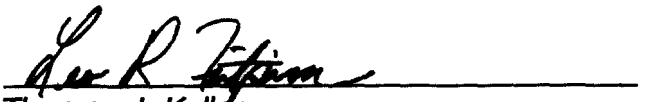
[24] New Section 101.73(c).

Commission's rules. AAR therefore opposes the petitions for reconsideration filed by the Joint Petitioners, the MSS Coalition and Omnipoint. The proposals in each of these petitions are contrary to the public interest and extremely harmful to the interests of incumbents. Therefore, the Commission should deny each of these petitions.

Respectfully submitted,

The Association of American Railroads

By: 

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CERTIFICATE OF SERVICE

I, Tina Harris, a secretary with the law firm of Verner, Liipfert, Bernhard, McPherson and Hand, hereby certify that on this 8th day of August, 1996, a copy of the Consolidated Opposition To Petitions For Reconsideration was mailed, first class postage prepaid to the following:

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